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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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In the Matter of	
American Society of Travel Agents, Inc.	
and	
Joseph L. Galloway	
Complainants	
v.	**Docket OST-99-6410 - 4**
United Airlines, Inc., American Airlines, Inc. Delta Airlines, Inc., Northwest Airlines, Inc. Continental Airlines, Inc., US Airways, Inc. Trans World Airlines, Inc., America West Airlines, Inc., Alaska Airlines Inc., American Trans Air, Horizon Air Industries, Inc., Midwest Express, Inc., Air Canada, KLM Royal Dutch Airlines, TACA International Airlines, Inc. and Air France	
Respondents	

ANSWER OF AMERICA WEST AIRLINES, INC.

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by individual airlines, none of which is alleged to have market power. There is no allegation that consumers have been harmed by the reduction in rates. Indeed, America West's efforts to control costs and manage its distribution network are pro-competitive because America West can operate more efficiently and pass cost savings on to consumers. There is no support for ASTA's proposition that travel agents, who bear no risk of loss for unsold tickets, compete against their airline principals. America West notes that the requested relief, to order airlines "to cease and desist immediately from such practices," would require the Department to regulate the rates at which airlines compensate travel agents, which would be inconsistent with antitrust law and the 1978 Airline Deregulation Act. Accordingly, America West requests that the Department not institute a formal enforcement proceeding in response to the ASTA complaint, but instead dismiss the complaint, at least with respect to America West.

I. ASTA FAILS TO STATE A CLAIM UNDER § 41712

ASTA's complaint fails to allege, or point to any evidence demonstrating, a violation of 49 U.S.C. § 41712 by America West, or any antitrust law. In *United Air Lines v. C.A.B.*, 766 F.2d 1107, 1114 (7th Cir. 1985), upholding the Civil Aeronautics Board's rules concerning computerized reservation systems, the Seventh Circuit noted that under the predecessor statute to 49 U.S.C. § 41712,[1] the Board could "forbid anticompetitive practices before they become serious enough to violate the Sherman Act." However, the Court also noted the Board should prohibit only conduct closely

[1] Federal Aviation Act of 1958, § 411(a), 49 App. § 1381(a) (currently codified at 49 U.S.C. § 41712).

resembling what has traditionally been regarded as monopolistic behavior. Id. This is consistent with the interpretation given by the Federal Trade Commission and the courts to Section 5 of the Federal Trade Commission Act, on which § 41712 was modeled.

Section 5 of the FTC Act cannot be construed to extend the Sherman Act beyond the fundamental limitations placed on the antitrust laws by Congress and the courts; under the same principles, neither can § 417 12. For example, the courts have rejected attempts by the FTC to use Section 5 to avoid the requirement of proof of a combination, contract, or conspiracy under Section 1 of the Sherman Act. *E. I. Du Pont de Nemours & Co. v. FTC,* 729 F.2d 128, 138-39 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC,* 630 F.2d 920, 925-28 (2d Cir. 1980), *cert. denied,* 450 U.S. 917 (1981). The FTC itself has recognized that "[i]f the conduct at issue . . . cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the Federal Trade Commission Act." *General Foods Corp.,* 103 F.T.C. 204, 366 (1984). As the Chairman of the FTC himself wrote: "While I do not dispute our role in filling inadvertent gaps in antitrust laws with enforcement of the FTC Act, that role should stop short of creating law in defiance of Congress." *Times Mirror Co.,* 100 F.T.C. 252, 257 (1985).

ASTA has not proffered evidence that commission reductions will lead to higher fares or foreclose consumers from obtaining competitive price information for air transportation. Accordingly, ASTA has not alleged evidence that would come close to supporting a claim under Sections 1 or 2 of the Sherman Act, and for this reason its complaint must fail under § as well.

A. ASTA Has Not Alleged Evidence of a Section 1 Violation

The heart of ASTA's complaint is that travel agents compete against airlines in the "market for the sale of air transportation." Airlines are in the business of providing air transportation. Since travel agents bear no risk of loss and function as sales agents for airlines, they cannot reasonably be considered to compete with their principals. In fact, the courts and the Department have already expressly recognized that travel agents are not competitors of airlines for purposes of the antitrust laws. *See Illinois Corporate Travel v. American Airlines, Inc.,* 889 F.2d 751, 753 (7th Cir. 1989), *cert. denied,* 495 U.S. 919 (1990); *Brian Clewer, Inc. v. Pan American World Airways, Inc.,* 674 F. Supp. 782, 786-87 (C.D. Cal. 1986), *aff'd,* 811 F.2d 1507 (9th Cir. 1987); *Pacific Travel International v. American Airlines, Inc.,* Order 95-1-2 (Jan. 4, 1995); *Association of Retail Travel Agents v. The International Air Transport Association,* Order 99-4-19 (April 29, 1999). Even if one indulges in the inaccurate assumption that the airlines do compete with travel agents, ASTA's complaint does not remotely allege adequate evidence to support an enforcement action.

ASTA's complaint alleges in vague terms that the airlines are reducing commissions as a way to limit the public's access to travel agents. However, there is no allegation or evidence that the respondent airlines contracted or conspired to reduce commission rates in an effort to eliminate travel agents. Without evidence of collusion, the complaint does not state a claim that respondents have engaged in behavior analogous to conduct violating Section 1 of the Sherman Act, 15 U.S.C § 1. Unilateral action cannot be found to violate Section 1. For example, in *Russell Stover Candies, Inc. v. FTC,* 718 F.2d 256, 257 (8th Cir. 1983), the court held a manufacturer's refusal to sell to

retailers unwilling to resell products at designated prices did not violate Section 1 because "petitioner's actions were unilateral in that there was no evidence of an agreement as is required by Section 1 of the Sherman Act." The court then held that Section 5 of the FTC Act – the analogue to § 41712 – could not dispense with the need for that essential element.

ASTA's complaint does not even suggest the existence of direct or even circumstantial evidence to support the inference of an agreement or conspiracy in restraint of trade. Rather, America West and other airlines have a legitimate independent business reason to reduce the commissions paid to travel agents – namely, to take advantage of efficiencies offered by improved technology and to avoid being put at a cost disadvantage when other airlines reduce their own commissions. Parallel business behavior such as the lowering of travel agent commissions does not by itself constitute sufficient evidence of coordinated action to support a finding of a violation of Section 1 of the Sherman Act. *See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *E. I. DuPont,* 637 F.2d at 138-39.[2]

Given that approximately 70 percent of all airline tickets are sold by travel agents, ASTA's theory that airlines could somehow eliminate travel agents in order to deprive passengers of objective information on fares and services makes no sense. Commission rate reductions are simply a consequence of the competitive nature of the air

[2] In America West's case, there is no need to speculate as to what the Company's independent business interests were. When other airlines previously reduced commissions paid to travel agents in 1997, America West did not do so, hoping that agents would generate additional business for the Company and thus produce revenue that would exceed the cost of the higher commission payments. That hope was not realized, and America West's prior experience clearly guided its unilateral decision to reduce commissions on this most recent occasion.

transportation industry. An airline paying travel agents higher commissions than those paid by other airlines would be putting itself at a competitive disadvantage, as well as adding to the cost of air transportation, a cost eventually passed on to consumers. An airline lowering its travel agent commission rates to match rates offered by its competitors is responding to competition and technological innovations such as electronic ticketing that have reduced the value of services traditionally provided by travel agents. ASTA's complaint does not point to any evidence of collusion among airlines to reduce commission rates, nor does it offer a plausible economic theory of an anticompetitive motive for such imagined collusion.

B. ASTA Fails to Allege Evidence to Support a Claim Under Section 2

ASTA's complaint does not allege that America West illegally obtained a monopoly or attempted to do so in violation of Section 2 of the Sherman Act, 15 U.S.C § 2, which prohibits monopolization and attempted monopolization, including predatory conduct toward those ends.

Under Section 2 of the Sherman Act as interpreted by the courts, the offense of monopolization requires (1) possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization under Section 2 requires (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct to accomplish the monopolization, and (3) dangerous probability of success.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). ASTA's complaint fails to offer any evidence to support these essential elements of a Section 2 violation. For purposes of Section 2, possessing market power generally requires having a greater than 50-percent share of a relevant market. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) (having more than 60 percent of relevant market evidence of monopoly power); *Greyhound Computer Corp., Inc. v. IBM Corp.,* 559 F.2d 488, 496 n.18 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978) ("We have expressed doubt that a 50 percent share of the market is sufficient to establish monopoly power per se."). Accordingly, it would be preposterous to suggest that a carrier such as America West has a monopoly or a reasonable chance of obtaining one in the market for air transportation, let alone the market for the sale of air transportation. [3]

C. ASTA Fails to Allege Evidence of Incipient Antitrust Violation

ASTA failed to allege conduct that violates the antitrust laws. Moreover, the alleged conduct could not lead to such a violation and therefore is outside the scope of § 41712. *See United Air Lines v. C.A.B.*, 766 F.2d 1107, 1114 (7th Cir. 1985). ASTA has offered no evidence that reductions in commissions paid to travel agents by airlines have resulted in, or have the potential to result in, increases in airfares or other injury to

[3] Indeed, the courts have repeatedly held that no violation of Section 1 or Section 2 of the Sherman Act can result from the decision by a seller to replace independent distributors *entirely* by distribution on the part of the seller itself. *Naify v. McClatchey Newspapers,* 599 F.2d 335, 336-37 (9th Cir. 1979); *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977). *A fortiori*, an airline's decision to sell more tickets directly to the public and fewer through travel agents cannot violate the Sherman Act.

consumers. If anything, reducing travel agent commissions benefits consumers by lowering the cost of air transportation sales. Similarly, there is no evidence to support ASTA's proposition that commission cuts will "eliminate or severely impair the public's access to travel agents."[4] America West notes that travel agents continue to sell the majority of airline tickets in the United States, and airlines continue to rely on agents for ticket sales, sometimes even offering commission overrides and other forms of incentive payments to travel agents that sell their flights.[5]

America West distributes approximately 70 percent of its tickets through travel agents. Obviously, eliminating travel agents as a distribution channel would not benefit America West but instead cause it economic harm. In this light, ASTA's claim that America West seeks to eliminate travel agents as a source of objective fare information is completely without merit. ASTA itself notes that "travel agency sales of air travel alone exceed $80 billion annually." To the extent that lower commissions, or increased use of new technologies such as Internet ticketing with the airlines or Internet travel services may result in some travel agents going out of business, these agents have not suffered an antitrust injury; the antitrust laws prevent injury to competition, not individual competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977). *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.,* 998 F.2d 391, 401-02 (7th Cir. 1993), *cert. denied,* 5 10 U.S. 111 (1994). Moreover, to the extent that

[4] In its Order to Show Cause tentatively disapproving the intercarrier agreements to fix commission rates, the Civil Aeronautics Board found, after investigation, that consolidation of the travel agent industry would not have an adverse impact on consumers. Order 79-9-65 (Sept. 13, 1979), 1980 CAB LEXIS 576, at 43.

[5] While ASTA asserts that its members are the only source of unbiased information on airfares, many travel agents receive override commissions that not only increase their revenue but may encourage them to direct customers to specific airlines.

consumers share ASTA's belief that travelers receive added value by using a travel agent, they evidently are willing to pay a service fee imposed by the agents to offset loss of revenue from the carriers. See J. Costello, *Airlines Discount Internet Fares While Agents Impose Higher Fees,* **THE WALL STREET JOURNAL INTERACTIVE EDITION,** November 9, 1999.

Finally, ASTA's reliance is misplaced on *Aloha Airlines v. Hawaiian Airlines,* 349 F. Supp. 1064 (D. Haw. 1972), *aff'd*, 489 F.2d 203 (9th Cir. 1973), as authority for its assertion that unspecified alleged acts undertaken by airlines "with predatory intent, for the purpose of eliminating travel agents as viable competitors are clearly within the sweep of 49 U.S.C. [§] 41712." As the case name indicates, *Aloha* involved one airline's claims against another. The opinion held only that the plaintiffs particular, well-pleaded claims in that case, if true, were sufficient to state a cause of action. The case had nothing to do with travel agents, and it certainly did not hold that any conduct by an airline constituted anticompetitive behavior toward travel agents, or that airlines compete with travel agents.

II. ASTA'S SPECIFIC ALLEGATIONS REGARDING INCREASED COSTS DO NOT DESCRIBE CONDUCT VIOLATING § 41712

To the extent ASTA's allegation that respondents are parties to actions, "some taken individually and others taken collectively through the Airlines Reporting Corporation and/or the International Air Transport Association, that are intended to and have the effect of raising travel agent costs and impairing travel agent efficiency," can be construed to include America West specifically, America West denies the allegation.

Nothing specifically alleged in ASTA's complaint regarding ARC or airline actions that may affect travel agent costs is inconsistent with the antitrust laws or could plausibly support an unfair practices claim. Furthermore, none of ASTA's specific allegations includes any allegations expressly concerning America West that may be admitted or denied pursuant to 14 C.F.R. § 302.207(b). However, America West answers ASTA's specific allegations with the following responses, which are numbered to correspond to the specific allegations in ASTA's complaint.

1. America West understands that ARC's training program was created based on feedback provided by travel agents and that any travel agent training required by ARC is related to travel agents' acquiring knowledge of the ARC reporting system. The costs involved are minimal. ASTA fails to allege anything about the ARC training requirements that could be taken to constitute anticompetitive or unfair conduct by America West.

2. ASTA fails to allege anything about ARC ticket security requirements that could be considered contrary to the antitrust laws. The cost of a safe is minimal and there is no indication this requirement affects many agencies. In this regard, America West understands that ARC has recommended for years that travel agents use 300-pound, fire-resistant safes. As noted by the General Accounting Office, ARC's ticket security requirements were developed with the cooperation and agreement of ASTA. See *Aviation: Issues Associated With the Theft of Stock Used to Create Airline Tickets* (Letter Report, 07/30/1999, GAO/RCED-99-219) at footnote 12.

3. ASTA fails to explain how some airlines' requiring travel agents to provide point-of-sale data through the ARC-administered Electronic Reservations Service

Provider (ERSP) Identification Number program could be considered anticompetitive. This data is similar to point-of-sale data provided to airlines by CRS vendors for CRS bookings, and is required to distinguish sources of bookings. Moreover, airlines have a right to enforce commission policies.

4. The complaint's vague allegations regarding airline resistance to ASTA-requested changes to the Department's code-share regulations to prevent multiple listing of code-share flights do not support a claim of unfair or anticompetitive conduct. It is well settled under the *Noerr-Pennington* doctrine, as extended to attempts to influence administrative agencies in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 5 10-1 1 (1972), that the concerted efforts by parties with common interests to influence public officials are constitutionally shielded from the antitrust laws.

5. Travel agent use of passive bookings that are of no benefit to America West is an issue raised in the pending CRS rulemaking, Docket 0ST-97-2881. America West notes that it has, in conjunction with ASTA, completed an educational campaign designed to ensure that agents know how to avoid passive segments while satisfying their back room accounting needs and properly issue bookings to receive full commissions.

6. ASTA's allegations regarding airline enforcement, through airline-owned GDSs, of penalties against travel agents' failing to meet segment booking thresholds, appear directed at system owners, and do not apply to America West, which is not such an owner. In fact, America West typically pays GDSs segment fees averaging approximately $3.50, and penalties for failing to meet segment booking thresholds only create an incentive for travel agents to make false bookings to meet quotas. Obviously, if ASTA's allegations regarding segment booking threshold requirements were considered

to describe an anticompetitive scheme, America West would be a victim rather than a perpetrator.

7. No possible impairment of competition could result from the alleged denial through IATA of a request by travel agents that ticket stock include a travel agent commission fee box for fee settlement purposes. America West understands that IATA is prepared to allow these fees to be processed through the settlement plan but does not want the fee to appear as part of the ticket price on the ticket stock, something it views as deceptive to consumers.

8. ASTA's allegations regarding airline refusal to permit travel agents the right to make certain refunds the airlines themselves make to passengers, and prohibiting travel agents from issuing "back-to-back" and "hidden city" tickets and redeeming frequent flyer miles for leisure trips would not, even if accurate, allege anticompetitive behavior. See *Pacific Travel International vs. American Airlines*, Order 95-1-2 (Jan. 4, 1995). Back-to-back and hidden city tickets are, whatever the contractual relationship between airlines and passengers, generally damaging to airline economic interests, and America West has a substantial business interest in ensuring that travel restrictions are not circumvented by its agents. With respect to refunds, travel agents are free to call airlines and ask for waivers for non-refundable fares, and America West will on occasion grant such waivers through travel agents. As for ASTA allegations concerning airline use of the Internet to offer low fares, the lower Internet fares reflect the efficiency of this method of distribution and the avoidance of exorbitant CRS fees. The Department has already found that Internet sales not available to travel agents do not violate Section 417 12. See Order 99-4-79. In regard to frequent flyer miles, ASTA seems to be alleging

that airlines should be required to pay commissions to travel agents for the redemption of frequent flyer awards that are generated by customer loyalty programs developed and operated by the airlines. Aside from the impracticalities of providing all travel agents with every airline's frequent flyer booking data, it should be clear that ASTA's argument has no support in the antitrust laws.

9. America West need not respond to ASTA's allegations regarding airlines not capping SATO's working commission in 1995.

10. As noted by ASTA, sales information generated by CRSs are made available to the airlines pursuant to DOT regulations. ASTA has made its objections known in the CRS rulemaking. With respect to ARC data, America West notes again that ASTA's complaint is based on the erroneous assumption that the airlines and travel agents are competitors.

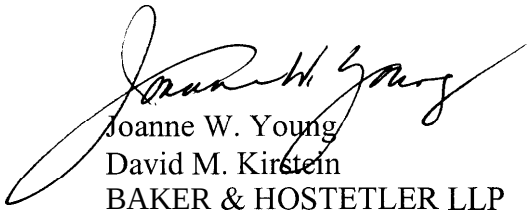
CONCLUSION

The conduct complained of by ASTA, that is, reductions in commission rates paid travel agents by airlines, is so far removed from the type of anticompetitive or unfair behavior prohibited by the antitrust laws and Section 417 12 that ASTA's request for an enforcement proceeding should not be entertained. The complaint does not describe the rate reductions as resulting from anything other than unilateral action, and it presents no circumstantial evidence to support an inference of conspiracy. The complaint fails to allege that America West or any of the other named airlines possesses market power or has a realistic chance of obtaining a monopoly in air transportation or the sale of air transportation. Finally, the complaint offers no evidence that the rate reductions have had

or are likely to have an anticompetitive effect. To the contrary, passengers enjoy lower airfares as a result of lower commission rates. The Department should summarily reject ASTA's transparent request for regulation of travel agent commission rates to benefit travel agencies at the expense of the traveling public.

WHEREFORE, America West respectfully requests that the Department dismiss ASTA's complaint as to America West as well as in its entirety.

Respectfully submitted,



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Dated: December 10, 1999

Counsel for America West Airlines

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer of America West Airlines, Inc., was this 10th day of December 1999, served by first-class U.S. mail, postage prepaid, upon the parties listed on the attached service list.

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